Supreme Court, U.S.
FILED
95-332 AUG 25 1995
OFFICE OF THE CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM 1995

COLANGELO SWEARENGEN AND LARRY NAILOR,
PETITIONERS
VS.
UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX THERETO

TOMMY H. JAGENDORF
COUNSEL OF RECORD
ATTORNEY FOR PETITIONER SWEARENGEN
5248 PELHAM CIRCLE
MEMPHIS, TENNESSEE 38120
(901) 685-5061

NICOLAS D. HARE
ATTORNEY FOR PETITIONER SWEARENGEN
500 CHURCH STREET, 5TH FLOOR
NASHVILLE, TENNESSEE 37219
(615) 242-1996

WILLIAM B. SELIGSTEIN
COUNSEL OF RECORD
ATTORNEY FOR PETITIONER NAILOR
100 N. MAIN, SUITE 2003
MEMPHIS, TENNESSEE 38103
(901) 527-0644

63 pp

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the Court of Appeals below had the authority to defy the law as set forth by this Court in making findings of fact in addition to those made by the District Court when the findings of fact of the District Court were not clearly erroneous?

(2) Whether the Court of Appeals erred in basing its de novo review of the issue of the existence of reasonable suspicion upon its own selective additions to the factual findings of the District Court when the District Court's factual findings were not clearly erroneous?

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Plaintiff/Appellant: The United States of America

Defendants/Appellees: Larry Nailor and Colangelo Swearengen

TABLE OF CONTENTS

Description	Page
Questions Presented for Review	1
List of Parties to the Proceeding	2
Table of Contents	3
Table of Authorities	4
Reference to Official and Unofficial Reports	5
Statement of Jurisdiction	5
Constitutional Provisions Involved in the Case	6
Statement of the Case	7
Argument	16
Appendix:	
A. Order of Court of Appeals of 5/31/95	24
B. Order of Court of Appeals of 7/06/95	40
C. Report of Magistrate Judge of 12/23/95	41
D. Order of District Court on Government's Objections to Report of Magistrate Judge of 3/18/94	50

TABLE OF AUTHORITIES

Cases **Page**

Maine v. Taylor, 477 U.S. 131, 145,
106 S.Ct. 2440, 2450-2451,
101 L.Ed.2d 110, ___ (1986).....11,13

Murray v. U.S., 487 U.S. 533, ___,
108 S.Ct. 2529, 2536,
101 L.Ed.2d 472, ___(1988).....12,13

United States v. Williams, 962 F.2d 1218,
1221 (6th Cir), cert. denied,
113 S.Ct. 264(1992).....12,13

Statutes

28 U.S.C. 1254.....5

28 U.S.C. 1331.....6

Constitutional Provisions

United States Constitution, Amendment IV...5

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS

There are neither official nor unofficial reports of any of the Orders or Opinions of any of the lower courts or administrative agencies in this case.

STATEMENT OF JURISDICTION

1. The Judgment sought to be reviewed was filed on May 31, 1995.

2. There have been no orders respecting a rehearing or an extension of time in which to file a petition for writ of certiorari.

3. This is not a cross-petition for writ of certiorari.

4. This Court has jurisdiction to review the judgment in question under 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS

The only constitutional provision involved in this case is the Fourth Amendment to the United States Constitution, which reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The District Court had original jurisdiction of the instant case pursuant to 28 U.S.C. 1331.

In its Order filed March 21, 1994 granting Appellees' motions to suppress, the District Court made the following findings of fact:

> The court makes the following factual findings which are in large part similar to the findings of the magistrate judge. On September 23, 1993, sometime between 7:00 p.m. and 10:00 p.m. Officer Worthy of the Memphis Police Department received a call to go to a fire station at South Main and Nettleton where a woman was reportedly screaming. There, Officer Worthy found a woman who was hysterical but said that while she had been out walking

her dogs, she was approached by two black males, approximately 20 to 25 years old, who pulled a gun and attempted to rob her. The woman, however had screamed and ran toward the fire station.

At the fire station, Officer Worthy interviewed an unidentified and now unlocatable male who stated that he had seen from his window two average or "medium size" black males running down the street and that one appeared to be chasing the other until they both got into the same automobile and drove away. He described the automobile as a light colored, squared-off back car, "possibly" a 1980's model Chevrolet Caprice or a Pontiac 6000. It is unclear if this unidentified witness had seen

these men as a result of the woman's scream.[1] In fact, he had seen the parked car even earlier.

Officer Worthy drove the victim to Crump and Wellington where he had earlier observed police officers making a stop involving two black males in a Chevrolet Caprice. The victim did not identify these two men as the men who attempted to rob her; Officer Worthy drove her back to the fire station, spoke with some of the firemen, and then took her home.

---

[1] At one point Officer Worthy testified that the witness looked out his window when he heard the lady scream. (Tr. p. 13). Later he testified that he was not sure if the witness heard the woman screaming or not when he had looked out of his window. (Tr. p. 21). The witness did not tell Officer Worthy that the two men he say were the defendents.

Officer Worthy returned to the fire station and began making out his report on the incident while seated in his car with the dome light on.

During this time, Officer Worthy noticed the defendants drive by in a light colored 1980 four-door Chevrolet Caprice Classic and, thinking that they might "possibly" be the men who attempted to rob the woman in front of the fire station an hour earlier, pursued them with his blue light on, sounding the siren a "couple of times." After about five blocks, the defendants turned right onto Linden and stopped. Officer Worthy testified the defendants did not attempt to evade him and that "it wasn't a pursuit or anything....

They just kept rolling." (Tr. p. 28).

Officer Worthy approached the driver's side and defendant Swearengen got out. Officer Worthy patted Swearengen down and placed him in the back of his patrol car from which he could not escape. During this time, Officer Worthy observed defendant Nailor's right shoulder dip down and come back up, "like he was putting something down." Nailor was asked to step out of the car, which he did with money in one hand and a phone in his pocket. He was similarly secured in the back of another patrol car which Officer Worthy had earlier called to assist him.

Officer Worthy approached the defendants' car and, with the

use of flashlight, noticed a bag containing what appeared to be marijuana partially hidden under a floor mat. Officer Worthy retrieved the bag and handcuffed and formally arrested the defendants. The automobile was later searched and cocaine base was found in the glove compartment.

(See Order On Government's Objections To Report Of Magistrate Judge, at 2-4).

As stated, supra, the District Court, upon the recommendation of the Magistrate Judge's Report, granted both Petitioners' Motions to Suppress Evidence on the basis that reasonable suspicion did not exist to stop the Petitioners' vehicle.

The government appealed to the Court of Appeals for the Sixth Circuit. On May 31, 1995, the Court of Appeals for the Sixth Circuit filed its per curiam opinion which

reversed the District Court's decision. The Court of Appeals found that the initial stop of Petitioners' vehicle was supported by reasonable suspicion.

Although the Court of Appeals correctly cited the law on the proper standards of review, it misapplied those standards. The Court of Appeals correctly stated that

> [a] district court's factual findings are upheld unless they are clearly erroneous. United States v. Williams, 962 F.2d 1218, 1221(6th Cir), cert. denied, 113 S.Ct. 264(1992). Whether reasonable suspicion exists is a question of law which we review de novo. Ibid.

(See Order of May 31, 1995, at 5).

The Court of Appeals, however, bluntly stated that "[t]he district court's findings of fact omitted pertinent, uncontroverted evidence which supports the investigative

stop." (Id. at 6). The Court of Appeals proceeded to make its own determination of the facts from its own review of the record, choosing to include only those omitted facts that were helpful to the government's case. (Id. at 6 - 8). The Court of Appeals then made its de novo determination of the legal question of reasonable suspicion based upon its own selectively embellished set of facts. (Id.).

The Court of Appeals never made a determination that the findings of fact of the District Court were "clearly erroneous." (Id. at 1 - 8).

The Court of Appeals neglected to refer to any additional facts omitted from the District Court's findings that were helpful to the Petitioners. (Id. at 6 - 8). Among the facts helpful to the Petitioners' cause which were not included in the District Court's findings of fact are the following: the fact that it was dark outside at the

time the arresting officer first saw the Petitioners; the woman who suffered the attempted robbery by two black males only saw her assailants momentarily, and her only description was two black males between the ages of 21 and 25; the only description given by the unnamed witness of the two men he had seen running to a car was that they were two black males of medium build and medium height, and he gave no information of their attire or whether they had beards or were clean-shaven; the unnamed witness' description of the car which he saw the two males enter and drive away in was a 1980's model Chevrolet Caprice or "to the most extreme" a Pontiac 6000, and not that the car was either one or the other; the witness stated to Officer Worthy that he would normally have "tried to get a tag or something in case a burglary or something had gone on", but that he had not done so in this case. (Id.).

Simply stated, the Court of Appeals made its own findings of fact without determining that the findings of fact made by the District Court were clearly erroneous.

ARGUMENT

1. The Court of Appeals for the Sixth Circuit did not follow the law as set forth by this Court when it made its own findings of fact without determining that the findings of fact made by the District Court were clearly erroneous.

This Court has unequivocally stated that the standard of review to be used by an appellate court in reviewing the factual findings of the lower court is not "de novo":

> . . . As this Court frequently has emphasized, appellate courts are not to decide factual questions de novo, reversing any findings they would have made

differently. [Citations omitted].... We note, however, that no broader review is authorized here simply because this is a constitutional case, or because the factual findings at issue may determine the outcome of the case. [Citations omitted].

Maine v. Taylor, 477 U.S. 131, 145, 106 S.Ct. 2440, 2450-2451, 101 L.Ed.2d 110, ___(1986).

In another case, this Court restated the above principle as follows:

Although these statements can be read to provide emphatic support for the Government's position, it is the function of the District Court rather than the Court of Appeals to determine the facts, and we do not think the Court of Appeals' conclusions are supported by adequate findings...

> To be sure, the District Court did determine that the purpose of the warrantless entry was in part "to guard against the destruction of possibly critical evidence," App. to Pet. for Cert. 42a, and one could perhaps infer from this that the agents who made the entry already planned to obtain that "critical evidence" through a warrant-authorized search. That inference is not, however, clear enough to justify the conclusion that the District Court's findings amounted to a determination of independent source.

Murray v. U.S., 487 U.S. 533, ___, 108 S.Ct. 2529, 2536, 101 L.Ed.2d 472, ___(1988).

In the instant case, the Court of Appeals cited the correct rule with regard to the standard of review:

> [a] district court's factual findings are upheld unless they are clearly erroneous. United States v. Williams, 962 F.2d 1218, 1221(6th Cir), cert. denied, 113 S.Ct. 264(1992). Whether reasonable suspicion exists is a question of law which we review de novo. Ibid.

(See Order of May 31, 1995, at 5).

However, the Court of Appeals did not follow the law. Apparently dissatisfied with the completeness of the facts as found by the District Court, the Court of Appeals inserted additional facts into the findings of fact. The Court of Appeals only inserted those facts which were helpful to the governments' case and did not insert any facts which were helpful to the Petitioners. (See Order of May 31, 1995, at 6 - 8).

As cited, supra, the law requires the reviewing court to accept the findings of

fact of the lower court unless those findings are clearly erroneous. In the instant case, the Court of Appeals did not determine that the District Court's findings of fact were clearly erroneous. Thus, the Court of Appeals clearly overstepped its authority by making its own findings of fact, rather than accepting the findings of fact of the District Court.

2. The Court of Appeals erred as a matter of law by basing its de novo review of the issue of the existence of reasonable suspicion upon its own selective additions to the factual findings of the District Court when the District Court's factual findings were not clearly erroneous.

As demonstrated in detail, supra, the Court of Appeals added its own selective additional findings of fact to those of the District Court. (See Order of May 31, 1995, at 6 - 8).

The question of whether reasonable suspicion existed in this case is a question of law reviewable de novo. However, the reviewing court is bound by the findings of fact of the lower court unless those findings are clearly erroneous. Murray v. U.S., 487 U.S. 533, ___, 108 S.Ct. 2529, 2536, 101 L.Ed.2d 472, ___(1988); Maine v. Taylor, 477 U.S. 131, 145, 106 S.Ct. 2440, 2450-2451, 101 L.Ed.2d 110, ___(1986); United States v. Williams, 962 F.2d 1218, 1221(6th Cir), cert. denied, 113 S.Ct. 264(1992).

Petitioners respectfully submit that the Court of Appeals committed reversible error in making its de novo determination of the existence of reasonable suspicion based on additional facts not found by the trial court.

Such action by the Court of Appeals invaded the domain of the trial court, which is in the best position to make the

determinations of credibility that are crucial to the fact-finding process. Petitioners respectfully submit that to allow the Court of Appeals the authority to make selective additional factual findings, as it did in this case, would render meaningless the trial court's function as finder of fact.

Respectfully submitted,

TOMMY H. JAGENDORF
COUNSEL OF RECORD
ATTORNEY FOR PETITIONER SWEARENGEN
5248 PELHAM CIRCLE
MEMPHIS, TN 38120
(901) 685-5061

NICOLAS D. HARE
ATTORNEY FOR PETITIONER SWEARENGEN
500 CHURCH STREET, 5TH FLOOR
NASHVILLE, TN 37219
(615) 242-3996

WILLIAM B. SELIGSTEIN
COUNSEL OF RECORD
ATTORNEY FOR PETITIONER NAILOR
100 N. MAIN, SUITE 2003
MEMPHIS, TN 38103
(901) 527-0644

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM 1995

COLANGELO SWEARENGEN AND LARRY NAILOR,

PETITIONERS

VS.

UNITED STATES OF AMERICA

RESPONDENT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

NO. 94-5451

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

LARRY NAILOR,

COLANGELO SWEARENGEN,

Defendants-Appellees

On Appeal from the United States District Court for the Western district of Tennesseee

Before: GUY, BOGGS, and SILER, Circuit Judges.

PER CURIAM. The United States appeals the district court's decision granting motions to suppress narcotics found during a search of a car in which defendants, Larry Nailor and Colangelo Swearengen, were riding. We reverse, finding that the initial stop of the vehicle was supported by a reasonable, articulable suspicion of criminal activity.

I.

The facts of this case are derived from the testimony at the hearing on the motion to suppress. Officer Worthy of Memphis Police Department was the sole witness.

Officer Worthy's initial involvement with this case occurred when he responded to a call at a fire station, where a woman had reported an attempted robbery. When Worthy interviewed the woman, she told him she had been out walking her dogs when she walked past two black males, approximately 20 to 25 years old. She was then approached from behind by the same men, who said something to the effect, "we're here again, and we're back"; one man pulled a gun, and they attempted to rob her. The woman screamed and ran to the fire station.

Although Officer Worthy did not find any eyewitnesses to the crime, he interviewed a man who stated that, when he heard the screaming, he looked out his window and saw two "medium height, medium build, young male blacks" with "low"

haircuts, running down the street away from the direction of the woman.[1] One man appeared to be chasing the other until they both got into a car. The witness observed the men from the building next to where the car was parked. The men then drove away in a light-colored, squared-off 1980's model Chevrolet Caprice or, "to the most extreme," a Pontiac 6000. The witness had seen the car parked at the building earlier. Although Officer Worthy twice asked the witness for his name, the witness did not give it.

In the course of responding to this call, Worthy observed police officers making a stop involving two black males in a Chevrolet Caprice. He drove the victim back to this location but she said they were not her assailants. The officer then took the

[1] There is some confusion in the record as to when the man looked out his window. Officer Worthy later testified that he was not sure if the witness heard the woman screaming or not when he looked out the window. The record makes clear that this witness did not observe the attempted robbery.

woman home.

Returning to the fire station, the officer parked in the fire station lot and proceeded to complete his written report of this incident. He was seated in his car, which was visible from the street, with his interior light on, when he noticed two black males drive by extremely slowly. The were looking around and traveling at a rate of between 5 and 10 miles per hour in a 35-mile per hour zone. There was very little traffic in the area. The car was a light-colored, 1980 four-door Chevrolet Caprice headed northbound on Main Street. The officer thought they might have been the men who attempted to rob the woman in front of the fire station an hour earlier. He thought, based upon his past police experience, they were returning to try and rob again, thinking the police had left. He pursued them with his patrol car's blue light on, sounding the siren a "couple of times." After about five blocks, the

defendants turned off Main Street onto Linden Street and stopped. Meanwhile the officer radioed for backup and relayed the vehicle's license plate number.

The officer insturcted the driver, Swearengen, to get out of the car. The officer patted him down and locked him in the back of his patrol car. During this time, the officer observed the passenger's right shoulder dip down and come back up, "like he was putting something down." The passenger, Nailor, was asked to get out of the car, which he did. Nailor was holding money in one hand and had a phone in his pocket. Shortly thereafter, Officer Downs arrived to assist Officer Worthy. Worthy then locked Nailor in Downs's patrol car.

Once the defendants were secured, Officer Worthy returned to the defendant's car and shined his flashlight into the front passenger seat. He noticed a bag, containing what appeared to be marijuana, partially hidden under a floor mat. He removed the bag and, since it contained

marijuana, he arrested the defendants. Officer Downs then searched the defendants' car and found cocaine in the glove compartment.

In a one-count indictment, the defendants were charged with aiding and abetting one another in the possession of approximately 50 grams of cocaine base with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

Defendants filed motions to suppress, alleging Officer Worthy had lacked reasonable suspicion to stop their car. A magistrate judge heard the motions and filed a report recommending they be granted. The district court adopted the magistrate judge's recommendation, and made the following findings of fact, in pertinent part:

> On September 23, 1993, sometime between 7:00 p.m. and 10:00 p.m. Officer Worthy... received a call to go to a fire station...

where a woman was reportedly screaming. There, Officer Worthy found a woman who was hysterical but said that while she had been out walking her dogs, she was approached by two black males, approximately 20 to 25 years old, who pulled a gun and attempted to rob her. The woman, however, had screamed and ran toward the fire station.

At the fire station, Officer Worthy interviewed an unidentified and now unlocatable male who stated that he had seen from his window two average or "medium size" black males running down the street and that one appeared to be chasing the other until they both got into the same

automobile and drove away. He described the automobile as a light colored, squared-off back car, "possibly" a 1980's model Chevrolet Caprice or Pontiac 6000. It is unclear if this unidentified witness had seen these men as a result of the woman's scream.[1] In fact, he had seen the parked car even earlier.

Officer Worthy drove the victim to Crump and Wellington where he had earlier observed police officers making a stop involving two black males in

---

[1] At one point Officer Worthy testified that the witness looked out his window when he heard the lady scream. Later he testified that he was not sure if the witness heard the woman screaming or not when he had looked out of his window. The witness did not tell Officer Worthy that the two men he saw were the assailants.

a Chevrolet Caprice. The victim did not identify these two men as the men who attempted to rob her; Officer Worthy drove her back to the fire station, spoke with some of the firemen, and then took her home. Officer Worthy returned to the fire station and began making out his report on the incident while seated in his car with the dome light on.

During this time, Officer Worthy noticed the defendants drive by in a light colored 1980 four-door Chevrolet Caprice Classic and, thinking that they might "possibly" be the men who attempted to rob the woman in front of the fire

> station an hour earlier, pursued them with his blue light on, sounding the siren a "couple of times." After about five blocks, the defendants turned right onto Linden and stopped. Officer Worthy testified the defendants did not attempt to evade him and that "it wasn't a pursuit or anything.... They just kept rolling."

Based on these findings, the court concluded that the officer lacked reasonable, articulable suspicion to stop the defendants, and granted the motions to suppress. The government now appeals.

II.

The government claims that 1) the district court erred in granting defendants'

motions to suppress, and 2) the arresting officer had reasonable suspicion to stop the defendants. A district court's factual findings are upheld unless they are clearly erroneous. United States v. Williams, 962 F.2d 1218, 1221 (6th Cir.), cert. denied, 113 S.Ct. 264 (1992). Whether reasonable suspicion exists is a question of law which we review de novo. Ibid.

The Supreme Court has held that when an officer has a reasonable, articulable suspicion that an individual is engaged in criminal activity, the officer may stop and briefly detain such a person for investigative purposes. Terry v. Ohio, 392 U.S. 1, 30 (1968). Probable cause is not required for such a stop, and the level of suspicion required is "considerably less than proof of wrongdoing by a preponderance of the evidence." United States v. Sokolow, 490 U.S. 1, 7 (1989).

In evaluating the legality of an investigative stop, we look to the totality of the circumstances. Sokolow, 490 U.S. at

7. An investigative stop is valid if all the relevant factors, taken as a whole, amount to reasonable suspicion, even if each individual factor is entirely consistent with innocent behavior when examined separately. Id, at 9. These relevant factors "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." United States v. Cortez, 449 U.S. 411, 418 (1981).

The district court's findings of fact omitted pertinent, uncontroverted evidence which supports the investigative stop. For example, Officer Worthy apprehended the defendants in part because they were at the scene of an attempted robbery shortly after it had occurred. He testified that in his experience would-be assailants have been known to return to a crime scene either to complete a crime or to commit another crime.

Also, the court's findings do not reflect the relatively detailed description of the assailants given by the witness,

including the style of hair. The witness was in the building next to where the car was parked as he watched them flee. Although, as the district court noted, the witness was "unidentified and now unlocatable," this does not mean the officer could not reasonably use the information he provided.

Perhaps the most significant omissions in the findings of fact were the officer's observations that the defendants were driving extremely slowly, between 5 and 10 miles per hour in a 35-mile per hour zone, even though there was very little traffic in that area at that hour of night, and they were looking around. It would be reasonable for such behavior to increase an officer's suspicion. Defendants argue it is not unusual for motorists to slow down upon seeing a police car. Although upon seeing a police car a driver may decrease speed to be sure he is within the speed limit, given the defendants were going 5 to 10 miles per hour, that is not a reasonable inference

here.

Finally, we think the finding that "Officer Worthy testified the defendants did not attempt to evade him and that "it wasn't a pursuit or anything.... They just kept rolling." is incomplete. The officer also stated: "But, I mean, usually when the police put their lights on, you are supposed to yield and pull to the right. They did neither." The officer's testimony in full reveals he observed at best ambiguous behavior on defendants' part. Again, reasonable suspicion need not rise to the level of probable cause, and, in these circumstances, we find such behavior probative of suspected wrongdoing.

After reviewing the entire record, we cannot agree with the conclusion that reasonable suspicion did not exist under the "totality" of circumstances. As the district court itself observed, the officer "stopped defendants because in his opinion, they matched the description of the assailants in that they were two black males

in a light-colored 1980's Chevrolet travelling very slowly in the vicinity of a recent crime." Given that these details matched the description of the assailants and their car, which was given by an eyewitness, we think the officer had reasonable suspicion to stop defendants for further investigation.

Nailor claims that the car description was "inconclusive," and Officer Worthy's earlier unsuccessful attempts to identify the assailants in connection with the other stopped Chevrolet Caprice supports a finding of no reasonable suspicion to stop defendants. We disagree. The witness described the automobile's make, model and approximate year. This description gave Officer Worthy a specific focus for his search.

The district court concluded that "nothing more than coincidence supported the assumption that the two robbers were the same people who had run to the car"; however, we concur with the government that

"it defies common sense to suggest that a reasonable person could not infer that the two men may have been the assailants." An officer is permitted to make common sense deductions based on the facts. See Cortez, 449 U.S. at 418-19.

We agree with the district judge that "where the issue is close, it is best to make certain that our liberties are not infringed in the zeal to prosecute." Here, however, we conclude that the totality of the circumstances provided reasonable suspicion sufficient to justify the initial stop.

REVERSED and REMANDED.

Case No. 94-5451

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

UNITED STATES OF AMERICA

Plaintiff - Appellant

v.

LARRY MAILOR; COLANGELO SWEARENGEN

Defendants - Appellees

BEFORE: GUY, BOGGS, SILER, Circuit Judges

Upon consideration of the appellees' motion to stay the mandate pending filing a petition for writ of certiorari,

It is **ORDERED** that the motion be and it hereby is **GRANTED** provided that certiorari is filed on or before August 29, 1995.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,	*
	*
Plaintiff,	*
	*
VS.	*NO.93-20260-Tu/Bro
	*
LARRY MAILOR AND	*
COLANGELO SWEARENGEN,	*
	*
Defendants.	*

R E P O R T

Both defendants in this case have filed motions to suppress the fruits of a search of an automobile in which they were riding on September 23, 1993. I held a hearing on the motions on December 20, 1993. Only one witness testified, Officer Marcus A. Worthy, of the Memphis Police Department.

Mr. Worthy testified that, on September 23, 1993, during the evening sometime between 7 p.m. and 10 p.m., he received a call to go to the fire station on South Main near Main's intersection with Nettleton. He

was told that there was a woman screaming. Just prior to getting the call, he had been at a location on Crump Boulevard where a Chevrolet Caprice automobile with two black males in it had been stopped. He did not make the stop but he saw it.

Mr. Worthy immediately went to the fire station on South Main and there found a woman with dogs talking to some of the firemen. She told Worthy that she had been out walking her dogs when two black males, about 20 to 25 years old, approached her and pulled a gun on her. She said that she screamed and ran toward the fire station. There was another neighbor present at the fire station, whose name Mr. Worthy did not get, who stated that he had seen two black males running down the street about the time of the episode that the woman was relating. The witness said that he first thought one was chasing the other until they both got into the same automobile. He described the automobile as light colored with a squared-off back. He thought it was either a

1980's Chevrolet Caprice or perhaps a Pontiac 6000.

Mr. Worthy called the officers who had made the stop at Crump, thinking that the people stopped there might have been the men who tried to rob the woman near the fire station. He asked the officers to hold those suspects until he could bring the woman over to look at them. Mr. Worthy took the victim of the attempted robbery in his squad car over to Crump to look at the men stopped there. The victim told him that they were not the ones who tried to rob her, after which he took her back to the fire station. That took around fifteen minutes. When he got back to the fire station, Mr. Worthy talked with some of the firemen for a few minutes, and then took the attempted robbery victim and her dogs home. He then returned to the fire station and, while sitting in his automobile in front of the station with the dome light on, began making out his report on the incident. This was some fifty minutes to an hour after the robbery

attempt.

As Mr. Worthy was sitting in his car making out his report, the defendants drove slowly by the fire station. The defendants are both black males. They were in a light colored 1980 four-door Chevrolet Caprice Classic. They were not breaking any laws. Mr. Worthy thought that the defendants might "possibly" be the people who tried to rob the woman in the same neighborhood about an hour before. He, therefore, pursued them, turning on his blue light. He said that he sounded his siren a "couple of times." The defendants traveled for some five blocks before they finally turned right on Linden and stopped. At some point, Mr. Worthy made a call for another car to assist him.

Mr. Worthy went up to the driver's side of the defendants' automobile and got the defendant Swearengen out. When Mr. Swearengen got out of the car he was holding money in his left hand and had a cellular telephone in his pocket. There was another cellular telephone on the seat of the car.

Worthy patted him down for weapons and placed him in the back of his patrol car, which Swearengen could not get out of. Nailor then got out of the car, and was ordered to go to another patrol car. He was put in the back of that car, also without the ability to get out.

Mr. Worthy testified that he went up to the Caprice and shined his flashlight inside it. There, partially hidden under a floor mat, was a bag containing what appeared to be marijuana. He got the marijuana out, and then the officers handcuffed and formally "arrested" the defendants. Later, a more thorough search of the vehicle yielded cocaine in the glove compartment.

Counsel for the United States maintains that Officer Worthy's stop of the defendants' vehicle was based on a reasonable, articulable suspicion that the occupants were the people who had attempted to rob the lady in the same neighborhood approximately an hour before and that therefore, the stop was authorized by Terry

vs. Ohio, 392 U.S. 1 (1968).

Mr. Worthy apparently had a suspicion that the defendants driving by the fire station about an hour after the incident were "possibly" the people who attempted the robbery. He said that he "thought it might be the car" identified by the other witness. Indeed, Mr. Worthy had a similar suspicion about the occupants of the car that had been stopped at Crump earlier. I do not, however, believe that Mr. Worthy's suspicion was sufficiently reasonable to warrant his stopping and detaining the defendants. He had information that a robbery attempt had been made by two young black males between 20 and 25 years old[1] in the same neighborhood some hour before. An unidentified witness had said that two black males left the area in a light colored automobile, which he thought to be either a Chevrolet Caprice or a Pontiac 6000. The only thing to connect the defendants with this incident was the

---

[1] The defendants appear older than 25.

fact that they were black males in a light colored Chevrolet Caprice legally driving in the same neighborhood about an hour after the incident.

Mr. Worthy said that the defendants were driving very slowly and looking around as they passed the fire station. He speculated that they may have come back to the neighborhood to rob somebody else. This was despite the fact that he was sitting in plain view in a patrol car with the dome light on. To hold that there was a reasonable, articulable suspicion to stop and detain the defendants would be tantamount to holding that the information Officer Worthy had justified the police in stopping all light colored 1980's Chevrolet Caprices and Pontiac 6000's containing two black males that were anywhere in the City of Memphis. I do not believe that the stop in this case can be justified under Terry.

The defendant, Colangelo Swearengen, was driving the vehicle and had control of it. That gives him standing to challenge the stop and subsequent search of the vehicle.

Mr. Nailor testified at the hearing that the automobile was titled to his wife and that it was his and his wife's only family car. He said that he had custody of the car that night, and had given the keys to Mr. Swearengen. I believe that this establishes standing on the part of Mr. Nailor as well. In any event, Judge Turner, to whom this case is assigned, has held that a passenger in a vehicle that is illegally stopped has standing to contest the subsequent search of that vehicle. United States vs. Grant, (W.D.Tenn. Cr. No. 92-20217-Tu/Bro).

I, therefore, recommend that the defendants' motions to suppress evidence seized from the search of their vehicle on September 23, 1993, be granted.

This the 22nd day of December, 1993.

AARON BROWN, JR.,
MAGISTRATE JUDGE

N O T I C E

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN TEN DAYS FROM THE DATE OF THE REPORT. FAILURE TO FILE THEM WITHIN TEN DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS AND FURTHER APPEAL. ANY PARTY OBJECTING TO THIS REPORT MUST MAKE ARRANGEMENTS FOR A TRANSCRIPT OF THE HEARING TO BE PREPARED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA	)
	)
Plaintiff	)
	)
Vs.	)**CR.NO.93-20260-TU**
	)
LARRY NAILOR and	)
COLANGELO SWEARENGEN	)
	)
DEFENDANTS	)

ORDER ON GOVERNMENT'S OBLECTIONS TO REPORT OF MAGISTRATE JUDGE

Defendants are charged with possession with intent to distribute approximately 50 grams of cocaine base, a Schedule II controlled substance, in violation of Title 21, United States Code, § 841(a)(1) and Title 18, United States Code, § 2. Defendants, asserting Fourth Amendment violations, have moved to suppress evidence seized from their persons or from the vehicle in which they were riding by members of the Memphis Police Department. The matter was referred to United States Magistrate Judge Aaron Brown, Jr. for proposed findings

of fact and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and (C).

Currently before the court for de novo review are the government's objections to the magistrate judge's Report.

FACTS

The court makes the following factual findings which are in large part similar to the findings of the magistrate judge. On September 23, 1993, sometime between 7:00 p.m. and 10:00 p.m. Officer Worthy of the Memphis Police Department received a call to go to a fire station at South Main and Nettleton where a woman was reportedly screaming. There, Officer Worthy found a woman who was hysterical but said that while she had been out walking her dogs, she was approached by two black males, approximately 20 to 25 years old, who pulled a gun and attempted to rob her. The woman, however, had screamed and ran toward the fire station.

At the fire station, Officer Worthy interviewed an unidentified and now

unlocatable male who stated that he had seen from his window two average or "medium size" black males running down the street and that one appeared to be chasing the other until they both got into the same automobile and drove away. He described the automobile as a light colored, squared-off back car, "possibly" a 1980's model Chevrolet Caprice or Pontiac 6000. It is unclear if this unidentified witness had seen these men as a result of the woman's scream.[1] In fact, he had seen the parked car even earlier.

Officer Worthy drove the victim to Crump and Wellington where he had earlier observed police officers making a stop involving two black males in a Chevrolet Caprice. The victim did not identify these two men as the

---

[1] At one point Officer Worthy testified that the witness looked out his window when he heard the lady scream. (Tr. p. 13). Later he testified that he was not sure if the witness heard the woman screaming or not when he had looked out of his window. (Tr. p. 21). The witness did not tell Officer Worthy that the two men he saw were the assailants.

men who attempted to rob her; Officer Worthy drove her back to the fire station, spoke with some of the firemen, and then took her home. Officer Worthy returned to the fire station and began making out his report on the incident while seated in his car with the dome light on.

During this time, Officer Worthy noticed the defendants drive by in a light colored 1980 four-door Chevrolet Caprice Classic and, thinking that they might "possibly" be the men who attempted to rob the woman in front of the fire station an hour earlier, pursued them with his blue light on, sounding the siren a "couple of times." After about five blocks, the defendants turned right onto Linden and stopped. Officer Worthy testified the defendants did not attempt to evade him and that "it wasn't a pursuit or anything.... They just kept rolling." (Tr. p. 28).

Officer Worthy approached the driver's side and defendant Swearengen got out. Officer Worthy patted Swearengen down and

placed him in the back of his patrol car from which he could not escape. During this time, Officer Worthy observed defendant Nailor's right shoulder dip down and come back up, "like he was putting something down." Nailor was asked to step out of the car, which he did with money in one hand and a phone in his pocket. He was similarly secured in the back of another patrol car which Officer Worthy had earlier called to assist him.

Officer Worthy approached the defendants' car and, with the use of a flashlight, noticed a bag containing what appeared to be marijuana partially hidden under a floor mat. Officer Worthy retrieved the bag and handcuffed and formally arrested the defendants. The automobile was later searched and cocaine base was found in the glove compartment.

GOVERNMENT'S OBJECTION TO RECOMMENDATION THAT INITIAL STOP OF DEFENDANTS WAS UNLAWFUL[2]

The government has objected to the

[2] The government's factual objections have been sufficiently addressed in the findings of fact herein.

magistrate judge's conclusion that the initial stop of defendants was unlawful because Officer Worthy lacked a reasonable, articulable suspicion to believe they had been or were engaged in criminal activity. Terry v. Ohio, 392 U.S. 1 (1968). The Report states that to hold that Officer Worthy's action was justified by Terry would be tantamount to justifying a stop by police officers of "all light colored 1980's Chevrolet Caprices and Pontiac 6000's containing two black males that were anywhere in the City of Memphis." (Report at 5).

The Fourth Amendment requires only "some minimal level of objective justification" for making the stop, which is less than a preponderance of the evidence and less than is required for probable cause. United States v. Sokolow, 490 U.S. 1, 7 (1989) (quoting INS v. Delgado, 466 U.S. 210, 217 (1984)). A determination of the validity of the stop turns on a consideration of the totality of the

circumstances, "as understood by those versed in the field of law enforcement" consistent with his or her past experience. United States v. Cortez, 449 U.S. 411, 417-418 (1981); United States v. Brignoni-Ponce, 422 U.S. 873 (1975). The Supreme Court has held that even conduct which is wholly lawful "might justify the suspicion that criminal activity was afoot." Reid v. Georgia, 448 U.S. 438 (1980).

Officer Worthy's testimony was that he stopped defendants because in his opinion, they matched the description of the assailants in that they were two black males in a light-colored 1980's Chevrolet travelling very slowly in the vicinity of a recent crime.

The magistrate judge's conclusion that allowing this information to justify the stop would justify police in "stopping all light colored 1980's Chevrolet Caprices and Pontiac 6000's containing two black males that were anywhere in the City of Memphis" is perhaps a bit broad and ignores the fact

that the defendants were driving in the same neighborhood where an attempted robbery had occurred approximately one hour before. Officer Worthy testified, "guys have come back and robbed people in the same area before." The evidence, however, on the other side of that issue is that the two persons who got into the car and who were apparently assumed to have been the assailants actually ran to their car and left the area, presumably to escape detection and arrest.

The government contends that Officer Worthy's suspicion was further based on his opinion that the defendants matched the description of the assailants, described as being between the ages of 20 and 25. The magistrate judge found that the defendants appear to be older than 25. The government has objected to this finding and has asked the court to hold an evidentiary hearing to make an independent determination of whether the defendants appear to be of a certain age, and further, to consider evidence of defendants' actual ages. The court finds

such a hearing unnecessary in light of the fact that the record simply does not support a finding that the officer was aware or cognizant of the defendants' ages until he had stopped their car and they exited the vehicle.

The government relies on two Sixth Circuit cases: United States v. Roach, 958 F.2d 679 (6th Cir. 1992), and United States v. Hardnett, 804 F.2d 353 (6th Cir. 1986), cert. denied, 479 U.S. 1097 (1987). In the Roach case, the officer was looking for an individual who had just run from the scene of an accident. The officer pursued on foot and observed an individual before he lost sight of him. He called other law enforcement officials who apprehended the suspect. The court held that the officer had reasonable suspicion that the individual "had acted unlawfully."

In Hardnett, a woman told officers that she had seen four black men with guns in a red or burgundy Pontiac in front of her house. When the officers arrived, the men

attempted to drive off in the Pontiac and were stopped and guns were seen. Hardnett analyzed the stop under the principal of Terry, and stated:

> In Terry, the Court held that a police officer may conduct a "stop" and "frisk" of an individual for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest" so long as the officer is "able to point to specific and articulable facts" which give rise to a reasonable suspicion of criminal activity. (emphasis added) [Terry v. Ohio, 392 U.S. at 21-22]. In assessing the reasonableness of the stop, the facts are "judged against an objective standard: would the facts

> available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" Id.

Hardnett, 804 F.2d at 356.

There are, however, substantial differences in the facts of the cited cases and the one at hand. In Roach, the officer contemporaneously spotted a walker where he had good reason to believe the suspect would be walking. Here, the defendants were seen in the downtown Memphis area of the attempted robbery, but not until an hour after the assumed assailants had fled the scene. Moreover, nothing more than coincidence supported the assumption that the two robbers were the same people who had run to the car. The weak link between the assailants and the men in the Pontiac might be overcome by itself but, added to the temporal delay, it drastically reduces the

reasonableness of concluding that the defendants were the criminal assailants of the woman. There certainly is no evidence to support the government's desired inference that fleeing criminals may reasonably be expected to return to the scene within the hour. Although such may have happened before, no evidence supports such an inference.

In Hardnett, the officer had an eyewitness report that four black men were seen with guns at a certain location in a red or burgundy Pontiac. Indeed they were there and attempted to leave as soon as the police arrived. The suspicions of the police of criminal activity by the men in the car was reasonable.

Police officers have the burden of establishing that their suspicion of criminal activity was reasonable. Terry, 392 U.S. at 20, 21 (focusing on the governmental interest justifying intrusion into constitutionally protected areas, "balancing the need to search [or seize] against the

invasion which the search [or seizure] entails." This is a burden which can only be borne by the government through the police officers who conducted the search [or seizure]). The government has not borne their burden in this case.

The issue in this case is admittedly close, but the court is compelled by the "totality of the circumstances" to conclude that the officer's suspicions do not rise to a level which justifies the stop and detention of two men who happened to be driving down the street an hour after a crime had occurred. The weakness of the tie between the actual assailants and the two men who were seen running to a light colored Chevrolet Caprice weakens the inference that a car similar to defendants' had been involved in the robbery and is a fact that must be considered. The facts, both negative and positive when viewed in their totality, do not warrant a man of reasonable caution to suspect that the defendants had attempted to rob the lady. The Constitution prohibits

a detention such as occurred here in order to protect all of us from future unreasonable seizures by agents of the government. Where the issue is close, it is best to make certain that our liberties are not infringed in the zeal to prosecute.

The motions to suppress are granted. All evidence seized from the defendants' persons or the car shall be suppressed upon trial of this case.

IT IS SO ORDERED this 18th day of March, 1994.

JEROME TURNER
UNITED STATES DISTRICT JUDGE